

JUSTICE AND HUMAN RIGHTS IN THE SPACE OF EXCEPTION: THE GUANTANAMO CONTROVERSY

Sıradışı Bir Yerde Adalet ve İnsan Hakları: Guantanamo Tartışması

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Abstract

The United States government has used its Guantanamo Naval Base to hold the 9/11 terrorist suspects since 2002. Use of this detention facility is a remaining controversial issue regarding justice and human rights. This paper investigates how the Bush administration's "global war on terror" discourse created unique methods of capture, detention, prosecution and punishment. This study also seeks answers to some questions such as the reason why Guantanamo was opened and could not be closed although desired. Beside, human rights abuses, violation of international agreements, use of torture, and inconsistency between government institutions are examined. Further, the importance of due process, forbidding indefinite detention and use of torture is emphasized. Conflict between Guantanamo policy and core American values is pointed out. It is concluded that the facility is expected to be closed after the transferring problem is resolved in near future.

Keywords: Guantanamo, Human Rights, Terrorist Suspects, Torture, Space of Exception, Enemy Combatant, Geneva Convention, Habeas Corpus.

Öz

ABD hükümeti 2002 yılından bu yana Guantanamo Deniz Üssü'nü 11 Eylül saldırılarının terör şüphelilerini tutmak için kullanmaktadır. Bu tutukevinin kullanımı adalet ve insan hakları bakımından halen tartışılan bir konudur. Bu makale Bush yönetiminin terörle küresel boyutta savaş söyleminin oluşturduğu kendine özgü yakalama, alıkoyma, kovuşturma ve cezalandırma yöntemlerini incelemektedir. Bu çalışma ayrıca Guantanamo'nun açılma sebebi ve arzu edilmesine rağmen kapatılmama sebebi gibi bazı sorulara cevap aramaktadır. Bunun yanında insan hakları ihlalleri, uluslararası

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anlaşmaların ihlali, işkence yapılması ve konuya farklı yaklaşan hükümet kurumları arasındaki tutarsızlıklar irdelenmektedir. Dahası, masumiyet karinesinin önemi, süresiz alıkonma ve işkencenin yasaklanması vurgulanmaktadır. Guantanamo politikası ile Amerikan temel değerleri arasındaki çatışmaya işaret edilmektedir. Sonuç olarak bu tesisin terör şüphelilerini başka bir yere transfer etme sorunu çözüldüğünde yakın gelecekte kapatılması beklenmektedir.

Anahtar Kelimeler: Guantanamo, İnsan Hakları, Terör Şüphelileri, İşkence, Sıradışı Yer, Düşman Savaşçı, Cenevre Sözleşmesi, Hâkim Önüne Çıkarılma Hakkı.

Introduction

This paper represents an attempt to shed light on the Guantanamo Bay controversy from a justice and human rights perspective. It explains what has been done regarding the controversial detention policy and the treatment of terrorist suspects in Guantanamo Bay since the September 11, 2001 terrorist attacks. The official and alternative explanations for related Guantanamo decisions are discussed. Human rights abuses are investigated in terms of violations of international agreements and national laws. As the most degrading form of treatment, torture is examined from deontological and consequentialist points of view. The following discourse tries to find answers to related questions such as how the inconsistent decisions of separate state powers can be interpreted and whether Guantanamo should be closed. Further, possible justification for Guantanamo, based on ethical reasoning and moral judgment principles are sought. The paper ends by offering suggestions for developing a sound legal basis for guiding international responses to international terrorism with the emphasis on eliminating indefinite detentions, and paying more attention to due process, and forbidding the use of torture under any circumstances. This detention policy and its cost to the United States, as well as its tolerability are also discussed.

1. “The Global War on Terror”

Until 9/11, the United States seemed to be safe country that was viewed as a superpower, and neither the government, nor its citizens expected the type of terrorist attack that occurred on 9/11. The World Trade Center, a symbol of capitalism, and the Pentagon, a symbol of the U.S. military were targeted by hijackers. The Bush Administration declared a “global war on terror” in the aftermath of the 9/11 attacks. Rigid measures and several legal strategies were adopted or implemented so that the perpetrators would be captured and further attacks would be prevented. In this respect, the United States Armed Forces began to track suspected terrorists, both overseas and on its own soil. The 9/11 attacks were found to be related to the al-Qaeda and Taliban organizations where terrorists were harbored and trained. The United States Armed Forces subsequently initiated the deposition of the government of Afghanistan, followed by the government of Iraq. The suspected terrorists believed to be involved in or having valuable information regarding the preparation of the 9/11 terrorist

attacks were sought and captured in different countries all around the world. A question then arose about where to house these captives and the world then became acquainted with the Guantanamo Bay Naval Base, Cuba – “the space of exemption” (Gregory, 2006).

Guantanamo Bay was leased from Cuba in February 1903. The lease agreement stated that Guantanamo Bay was to be used solely for coaling and naval station purposes, and a clause emphasizing that it could not be used for any other purpose was added. The central provision of the lease agreement recognized the ultimate sovereignty of the Republic of Cuba, along with the complete jurisdiction and control of the United States. However, a long time after the original lease agreement was signed, Guantanamo Bay was selected to host the enemy combatants who were suspected of being involving in the 9/11 terrorist attacks. Attributed to Giorgio Agamben, Gregory (2006) described this global war prison as a lawless space or a space of exception. He stated that the detention camp violated the terms of the lease, and was beyond the national territory of the United States and outside of the law. The arguments concerning jurisdiction and law began after the arrival of the first 20 captives at Guantanamo on January 2002. The choice of Guantanamo was to satisfy American public opinion and while the Bush Administration was arrogant against the whole world, they were really taking domestic politics into account.

This high security detention facility was considered to be out of reach by the United States jurisdiction by the Bush administration who sought to prevent access to criminal justice system. It was argued that Guantanamo Bay was beyond the reach of any district court, because while the United States had complete jurisdiction over the base, it was neither part of the United States nor a possession or territory of the United States (Michaelsen and Shershow, 2004). On the other hand, the Department of Justice pointed out that the relevant provisions of the United States Code under title 18 defined the United States as all areas under the jurisdiction of the United States including all places and waters ‘continental or insular’ (18 U.S.C. § 5). The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment was implemented by title 18 of the United States Code designed to guide the conduct of interrogations outside the United States. Jurisdiction was important to the Guantanamo detainees in terms of the implementation of the international, constitutional, and other related laws. The extraordinary attacks however, required extraordinary interventions to be implemented in order to show the rest of the world that the United States remained powerful, able to prevent future offenses, and able to punish terrorists. Therefore, an instant response was necessary, and there was no time to spend on employing the regular legal system (Addicott, 2002).

Another controversial issue was whether the detainees were entitled to protections afforded by the Geneva Convention. Since the United States administration had declared a ‘war on terror’ the captives should possibly have been referred to as prisoners of war (POW). Considering that the Geneva Convention prohibits torture, inhuman, degrading and cruel treatment, and requires a fair trial for POWs, the captives should have been able to benefit from the relevant Convention clauses. However, the Bush administration declared that the detainees were not entitled to any of the protections listed under the Geneva Convention. President Bush had the authority under the United States constitution to suspend the

requirements of the Geneva Convention. Although his administration later insisted repeatedly that the detainees would be treated in a manner consistent with the Geneva Convention, this statement was a matter of policy, not law. The topics of jurisdiction and the protection clauses of the Geneva Convention were the first controversial issues that arose when the authorities publicly discussed the Guantanamo Detention Camp situation (Gregory, 2006).

The United States government had proposed several official explanations for the decision to open Guantanamo and its utilization as a space of 'exception'. There were three official explanations described by the former Secretary of Defense Rumsfeld in this regard. First, the prisoners were extremely dangerous; therefore they had to be kept away from the streets to prevent future attacks. Second, the prisoners had valuable information and the administration had to collect intelligence from them to prevent future attacks. The third explanation was that they would be tried for war crimes (Hickman, 2011). Hickman argues that the rationale for the three official explanations was flawed. This was because the detentions resulted in an increase in the population of prisoners who were not extremely dangerous, who had not been charged for carrying out crimes eligible for prosecution by a war crimes tribunal, and prisoners who did not possess valuable intelligence. The author suggests three alternative explanations for the decision for opening Guantanamo including: the public spectacle of victory, punishment, and the announcement of a new international order, which constituted a signal of power to other states. He further stated that the distribution of the pictures of Guantanamo prisoners dressed in orange prison garb as they kneeled in shackles or stared behind the wire cages signaled both a picture of threat, as well as defeat. Therefore, the publics' mind was prepared for the invasion of Iraq.

Greenberg (2009) emphasized the necessity notion for Guantanamo in her book by explaining that the government was responsible for imprisoning a large numbers of prisoners captured in Afghanistan. The author described the poor conditions in the Afghan prisoner camp and implied it was necessary to bring them to Guantanamo to prevent a further human rights disaster (Greenberg, 2009). Graham (as cited in Hickman, 2011) follows the same stance indicating that the Guantanamo decision was the result of pressure to find a desirable site to house a large number of suspected terrorists captured in Afghanistan and a good way of intelligence gathering. However, Hickman (2011) criticizes both because they overlooked the fact that only a small number of the prisoners captured in Afghanistan were actually transferred to Guantanamo.

Still another alternative explanation for the Guantanamo decision by Margulies (2006) indicated that the Bush administration wished to change the distribution of constitutional authority by making the presidency more powerful. He argued that the president abused his power by exceeding the red lines of the constitution and by using his authority to enable officials to violate human rights (p.141).

2. Human Rights Violations

Human rights, as in its general definition, are fundamental inalienable, indispensable rights, and rights one is inherently entitled to simply because one is human being. The released detainees alleged that the Guantanamo officials violated their basic human rights. In order to understand which rights were violated, the most prominent legislation related to human

rights needs to be examined. The most prominent text related to this issue was embedded in the Geneva Convention, Article 3. This article in sum; requires humane treatment of (POW) in all circumstances, and prohibits violence, cruel treatment, and torture at any time, and in any place, and ensures judicial guarantees. The persons under protection are described “as the persons taking no active parts in the hostilities including members of armed forces who have laid down their arms and no longer able to fight by sickness, wounds, detention, or any other cause.” Although, the Guantanamo captives could be considered as persons no longer taking part in hostility and no longer capable of fighting because of their detention, the Bush Administration proposed this group had alternative status, namely the status of an “enemy combatant”, apparently to prevent the prisoners from benefitting from the Convention protections. Article 4 of the convention broadly explains POW status and Article 5 states persons in enemy hands would be under the protection of the Convention until their status is determined by a competent tribunal. The arguments concerning the status of the captives and competent tribunals arose as a result of these regulations (Elsea and Garcia, 2010).

It was argued that the Taliban never distinguished themselves from the local civil population and they did not fight in accordance with the laws of war. Al-Qaeda was accepted as an international terrorist group in the official speeches of the United States government officials. Therefore both the Taliban and al-Qaeda insurgents were not considered to be a state parties and POWs eligible for protection under the articles in the Geneva Convention (Michaelsen and Shershow, 2004). The Convention is said to include some ambiguities such as the expression “conflict not international in character”. The Bush administration accepted a policy that implied the al-Qaeda and Taliban fighters did not belong to a state party and therefore they should constitute “unlawful combatants”. These unlawful combatants could challenge their status only before a Combatant Status Review Tribunal after their arrival at Guantanamo. They were subjected to an annual review by the Administrative Review Board to determine if the enemy combatants still posed a threat to the United States (Hardy, 2009).

The Universal Declaration of Human Rights (UDHR) is another set of formal regulations having global recognition. Article 5 of this declaration indicates that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Even though the Declaration places basic human rights under protection, Donnelly (2003) argued that a controversy existed in the perception and interpretation of these terms. The author raised the question as to whether the interrogation techniques used in Guantanamo were inhuman, cruel or degrading, and if they constituted torture. Moreover the same question was posed if the death penalty was given. While most European states considered these actions inhuman, cruel, and degrading, the United States did not.

The Declaration also included some other provisions related to the Guantanamo controversy. For instance; Article 8 provides for rulings regarding effective legal remedy, Article 9 denotes a prisoner may not be subjected to an arbitrary detention and exile, Article 10 requires a fair trial, and Article 11 necessitates the presumption of innocence. Besides, the United States is also a signatory state of the International Covenant on Civil and Political Rights (ICCPR). The Covenant also has articles to be considered such as articles 2 (legal remedy), 7 (protection against torture), 10 (humane treatment when deprived of liberty), and 14 (presumption of innocence) overlapping with the Geneva Convention or UDHR (UN, 2012). The judicial guarantees stated in the Geneva Convention, Article 3 include the right

for a person under arrest to be brought before the court, in other words the right of Habeas Corpus. Human rights violations will be discussed in the light of these aforementioned rights in the next section.

There were some grounds for the way detainees were treated by the Guantanamo Joint Task Force (JTF). President Bush issued a military order detailing the guidelines for purposes of the detention and treatment of the suspected combatants and for establishing military commissions to try certain detainees. In reality, detainees were transferred to Guantanamo for purposes of preventive detention and potential prosecution for any war crimes they may have committed (Elsa and Garcia, 2010). According to Gregory (2006), the JTF charged with conducting interagency interrogations at Guantanamo, allowed increasingly aggressive techniques to be used against detainees. Gregory asserted that the harsh interrogation techniques used fell into three categories. The first category included direct questioning, yelling, and deception. The second category consisted of the use of stress interventions including hooding and the removal of clothing and forced shaving, and the induction of stress through aversion. The third category included convincing the prisoner that death or severe pain was imminent for him and/or his family, exposure to cold weather or water, and use of wet towels and dripping water to induce the misperception of suffocation. The Department of Defense authorized the first two categories and stated that while all the techniques in the third category might be legally employed, thus their approval was not warranted at that time. The line between these techniques and torture was not very clear and most of them must be considered as inhumane, cruel, and degrading (Sands, 2009).

Gregory (2006) further set forth the view that the field manual of the United States Army emphasizes obedience to international law, proscribes torture and coercive interrogation, and requires military interrogators to comply with the Geneva Conventions. However, Rumsfeld, Secretary of State of George Bush Administration, approved 24 of the interrogation techniques among the 35 and the prisoners released from Guantanamo testified that the red lines were exceeded on many occasions. Rumsfeld was criticized for enforcing accountability in a very poor manor and criticizing his subordinates. His later published book, "Rumsfeld's Rules", demonstrated that he favored core values but did not held same standards when he was in office (Baltoni, 2013). Also, the CIA were authorized to use six harsh interrogation techniques which comprised forcing prisoners to stand handcuffed and shackled for more than 40 hours, forcing them to stand naked in a cold cell for prolonged periods and often dousing them with cold water and simulated drowning. Camp Echo was the CIA's own prison with in the facility. In an interview following three suicides, historian Alfred McCoy stated that the CIA implemented psychological torture and produced a state of hopelessness and despair (as cited in Gregory, 2006). The evidence of the authorized and conducted torture is found in Sands' (2009) book entitled the "Torture Team". Sand describes how systematic torture from sleep deprivation to stress positions was conducted by interrogation teams in Guantanamo. The evidence is based on interviews with state officials, counseling English national detainees, and government documents including the document signed by Rumsfeld approving harsh interrogation techniques.

After the maltreatment of prisoners began to be discussed publicly, some measures were taken. A new Army Field Manual which authorized 19 interrogation techniques and

outlawed beating, hooding, forced nudity, threatening with dogs, deprivation of food, water or medication, sexual humiliation and waterboarding was released in September 2006. However, the CIA was exempt from these provisions (Gregory, 2006). Two key rulings by the United States Supreme Court took place. In the *Hamdi vs. Rumsfeld* case, the Supreme Court found that persons named “enemy combatants” have the right to challenge their detention in court before a judge. This case concerned the rights of an American citizen detained as an enemy combatant. In the second case, *Resul vs. Bush*, the Supreme Court made a decision that the federal habeas corpus statute provided the federal courts with jurisdiction to consider habeas corpus petitions by persons detained at Guantanamo (Elsea and Garcia, 2010).

Even though the rule of law requires the basic right to be recognized that persons under arrest have right to obtain legal assistance, and right to counsel, the detainees were held in Guantanamo for almost two years after their arrival in January 2002, without access to any legal assistance or counseling. The lawyers arrived at Guantanamo only after 2004 and began to communicate with prisoners. The lawyers were told by the officials that their clients were “worst of the worst”. However, the counseling that proceeded with detainees revealed that many of them were being held without any charges being laid, and without adequate evidence against them. When the lawyers first arrived at Guantanamo they found it difficult to gain the confidence of the detainees. They had already been subject to harsh interrogation techniques and torture and they thought that Guantanamo was a lawless space. After many counseling sessions they told their stories which ended with representation by lawyers before court. Some of them were found to not pose any threat and were released (Denbeaux and Hafetz, 2009).

The public’s concerns regarding all these issues led to the adoption of the Detainee Treatment Act (DTA) of 2005, which required uniform standards for the interrogation of persons held in the custody by the Department of Defense and it banned the cruel, inhuman or degrading treatment of detainees. However it deprived the courts of the jurisdiction to hear challenges based on treatment and living conditions voiced by Guantanamo detainees. The DTA also eliminated the Federal Courts’ statutory jurisdiction over habeas corpus claims, but provided for limited appeals of status determination for Combatant Status Review Tribunals (CSRT) along with final decisions that could be made by military commissions (Elsea and Garcia, 2010). Although the president signed the DTA reluctantly, the lawyers of the Department of Justice warned the District Court that under the provisions of the Act, prisoners only had the right to appeal their determination as “enemy combatants”, but did not have the right to seek protection against their treatment in Guantanamo. The independent organization of Human Rights Watch criticized this contradiction by stating that “The law says you cannot torture detainees at Guantanamo, but it also says you cannot enforce the law in courts” (Gregory, 2006).

Since the most brutal violation of rights in Guantanamo seems to have been the conducting of torture, this issue requires further exploration. Despite all the legal and moral laws of disallowance of torture, why the authorities approved some types of interrogation techniques and why the task force chose to conduct torture, were important questions that arose as a result. Nincic and Ramos (2001) argued that there are two models of ethical

reasoning in moral judgment; Deontological and Consequentialist. The deontological approach explains the acts in question by emphasizing their relationship to a rule or duty. There is an implied obligation and the rules governing this urge one to do his/her duty. On the other hand, the Consequentialist approach proposes that if the acts produce a good outcome, they are morally right. The authors found that the Deontological approach was dominant in the public mind across various levels of torture. In addition, they found that contrary to common sense, there was no significant relationship between the attitudes towards the cruel treatment of the suspects and the intensity of the perceived foreign threat.

The authors further explored the perceptions of the public regarding the use of torture. According to the Program on International Policy Attitudes (PIPA) survey conducted in 2004, 77 percent of the respondents agreed that torture is morally wrong. The reason for their response was that they often did not know for sure if someone actually had useful information or was in fact a terrorist. Moreover, 71 percent believed that if torture was allowed, a significant number of innocent people would be tortured. In response to another question, 48 percent of those surveyed responded that they did not support the idea that torture saves lives. The results of the survey indicated that most Americans did not support the use of torture, even when attempts were made to justify it through claims of the war on terror (Nincic and Ramos, 2001).

There are two views concerning the effectiveness of torture. One is, that it works, and the other, is that it does not. Former Vice President Cheney referring to the waterboarding of one al-Qaeda terrorist on ABC Online claimed that at least in that case, torture was effective. On the other hand, the problem was that the victims of torture had a strong incentive to lie in order to escape this act. One CIA official pointed to the ability of torture to get anyone to confess to anything if the torture is severe enough. In another case, one of the al-Qaeda terrorists turned over to the Egyptian authorities informed under torture that Iraq's military leaders trained al-Qaeda and other terrorist groups to use chemical and biological weapons. The administration used this information to legitimate the invasion of Iraq, but later, the CIA admitted that the terrorist tortured had no knowledge of such training or weapons. He fabricated the statement in order to escape torture and because he was terrified of further harsh treatment. Also, torture is problematic and should not be used because of the possibility of the same conduct to Americans captured abroad for revenge (Nincic and Ramos, 2001 p. 241). Smith (2007), in line with Nincic and Ramos, argued that torture was used to punish the prisoners, but this failed to reveal useful intelligence from them. He pointed out that the Guantanamo detainees were far from "terrorist supermen" and that very few of them were terrorists.

Blaming the government, Gregory (2006) indicated that a state may thrive on the fear of terrorism to legitimate its practices and the fear of torture to frighten those who might plan to engage in hostility. Usually the state uses democratic means for this legitimation and this produces confusion in the relationship between democracy and human rights. Goodhart (2008) argued that some critics see a conflict between the democratic and human rights approaches, particularly when courts overturn democratically enacted security policies. Here the question "Does more security for us mean less liberty for them?" comes into mind (Chebel, 2012). Goodhart (2008) partly answered that question by implying that whether

terrorist suspects may be detained for 72 hours or 72 days requires careful democratic assessment about how to achieve the maximum mix of security and human rights. He stated that the right to a fair and timely hearing constitutes a democratic limitation. However, in the Guantanamo case that right had been suspended for a long time period. He strongly supported the idea that commitment to freedom and equality takes torture and indefinite detention off the table.

After addressing the human rights violations of the base, in general, the inconsistent administrative decisions and adjudications of separate state powers, which were the direct subjects of further controversy, will be examined in the next section.

3. Inconsistency Between the Separate State Powers

Following the 9/11 attacks, contradictory voices were raised by the separate state powers. The main arguments surrounded the jurisdiction, and the protections afforded under the Geneva Convention, plus the rights of Habeas Corpus issues, and the prosecution of detainees. First, The Authorization for Use of Military Force (AUMF), a joint resolution by the United States Congress, was passed on September 14, 2001. This resolution authorized the use of the United States Armed Forces against those responsible for the terrorist attacks. With this authorization the president was granted the authority to use all “necessary and appropriate force” against those whom he determined “planned, authorized, committed or aided” the 9/11 attacks, or who harbored said persons or group. President Bush signed the AUMF on September 18, 2001, and thus the controversy began (Joint Resolution, 2001).

As already mentioned, the Bush Administration assumed that the Guantanamo base was outside the United States jurisdiction and the president had the authority under the constitution to suspend the Geneva Convention (Gregory, 2006). However, Elsea and Garcia (2010) point out that the courts did not accept the Administration’s view that the president had an inherent constitutional authority to detain those he suspected of involvement in international terrorism. Rather, the courts looked to the language of the AUMF and other legislation to determine the boundaries of presidential power. Contrary to the President’s military order, the Supreme Court determined that all prisoners taken during armed conflict were protected under Common Article 3 of the Geneva Convention. The court ruled that they must not be tortured or subject to cruel, inhuman or degrading treatment, and they must be tried before regularly constituted courts providing generally recognized judicial guarantees. These statements were signs of the debate that ensued between the Departments of Defense, and Justice, and the State Department over the prosecution of the war on terror (Gregory, 2006).

The detention of the terrorist suspects raised the question as to whether incarcerating individuals without giving them access to the legal system, was consistent with the principles of liberal democracy (Chebel, 2012). In reality, in a liberal democratic state, nobody can be outside the law even if in enemy hands (Gregory, 2006). The United States Supreme court ruled in the *Resul v. Bush* case that the courts had the jurisdiction to hear challenges on behalf of persons detained at Guantanamo. After this development the Department of Defense established administrative hearings, called Combatant Status Review Tribunals to allow the detainees to object to their status as enemy combatants, and declared their rights to habeas corpus. Following that, lawyers filed many petitions on behalf of detainees in

the District Court, where the judges reached inconsistent conclusions about whether the detainees had any enforceable rights to challenge their treatment and detention (Elsea and Garcia, 2010).

Later in the case of *Hamdan v. Rumsfeld*, the Supreme Court ruled that the Military Tribunals established by the president were not carried out in accord with the Uniform Code of Military Justice (UCMJ), which includes the law of war and the Geneva Convention rulings. Nevertheless, in response to this ruling, the executive power adopted the Military Commission Act (MCA), which authorized the president to convene military commissions to try enemy combatants without the consent of the UCMJ and to eliminate the court jurisdiction over all pending and future lawsuits by detainees or their lawyers (Elsea and Garcia, 2010). In favor of the MCA, Petty (2009) argued that the act codified the United States application of the laws of war to Guantanamo prisoners. According to this author, the pre-trial phase of the Hamdan case demonstrated that the provisions of the Geneva Convention had been faithfully implemented by the military commissions, and had contributed to the trial process as one which was full and fair.

Still another contradictory example was the different views held by the government and the courts on the topic of constitutional protection. The government claimed that the aliens in Guantanamo were not entitled to any constitutional protection, including the right of habeas corpus. Yet, the Supreme Court rejected this argument in the case of *Boumediene v. Bush*, and ruled that the constitutional protection of habeas corpus should be extended to the noncitizen detainees and cannot be suspended by an ordinance unless an adequate alternative solution is provided. As a result of the ruling, detainees could file a petition for a habeas corpus review of their classification and detention as enemy combatants. However, several issues remain unsolved. The scope and the extent of the habeas review available to detainees, the remedy for persons held unlawfully, and determining from which constitutional provisions the Guantanamo noncitizen detainees could benefit, were among these issues (Elsea and Garcia, 2010).

What does the inconsistency among state institution decisions mean? It seems that their decisions had some basis in accepted legislation processes and their practices may have been democratic. However, they may not have been democratic in a consistent way. If this issue is examined from a counter perspective, the concept of democracy might be viewed as hegemony of the majority over the minority (Chebel, 2012). Besides, controversy sometimes emerges from differences in the interpretation of laws by state authorities. Parties may try to legitimize their policies by interpreting the rule of law in the frame of liberal democracy. Gregory (2006) argued that law is not outside violence. It becomes the grounds for political struggle not only as a result of its suspension, but also in its formulation, interpretation and application. His argument provides a reasonable explanation as to why there may be inconsistencies between the separate powers. These controversies are followed by a discussion of whether the detainees can be tried on United States soil and the attempt to close Guantanamo.

4. Possibility of Transferring Detainees and Closing Guantanamo

After Attorney General Eric Holder voiced the intention to try the most charged terrorist Khalid Sheikh in a New York Federal Court, several opposing views to this idea were raised. This intention impacted the Obama administration's efforts to abolish the system of military courts and several detention facilities, such as Guantanamo-Cuba, Bagram-Afghanistan, and Abu Ghraib-Iraq, which had been part of the central policy of the Bush Administration's war on terror. The Republicans and other members of the Bush Administration accused the Obama administration of failing to understand the danger of trying a suspected terrorist on the mainland. They were concerned that the trial would give the prosecuted individual the chance to be released. It was argued that the protections of the legal team and inconsistencies among the juries would cause accused terrorists to escape justice. The intention to try terrorists on United States soil also raised controversy in Europe and among international legal experts. Their main concern was that the most well-known alleged terrorists would be unable to receive a fair trial in the United States and particularly much less so in New York City, where the sorrow and anger of the people remained high. In addition, there would be some drawbacks including non-impartial jurors, defective evidence obtained through torture, and from a European perspective, the possibility of capital punishment (Lang, 2010).

Due to the growing opposition against Guantanamo, President Obama issued an executive order on January 22, 2009 to close the facility in a year. The order required a review of the detainees' status in terms of release, transfer or continued detention. After a while, the Guantanamo Review Task Force completed the assessment process of 240 detainees. 36 of them were the subject of active cases or investigations, 126 were approved for transfer to their home or a third country, 48 were found extremely dangerous and it was decided they should be held indefinitely under the laws of war, and 30 Yemeni detainees were designated for conditional detention until security conditions in their home country returned to normal. Congress was strongly opposed to the idea of transferring the detainees to the mainland and blocked the plans to bring them to the United States for trial or continued detention (Elsa and Garcia, 2010; Finn, 2010).

Almost every Western ally of the United States publicly called for closure of the facility. However, none of them were willing to accept any third party nationals themselves. Since the transferring of the detainees to their home countries would lead to more suffering and human rights abuses, the United States negotiated with several countries to have them accept the released detainees. For instance, Uighur detainees could not be transferred to China because they would be subjected to inhuman treatment because of the political conditions there. It was suggested that by accepting some Uighur detainees on the mainland of the United States, this would not leave the entire burden to others. Thus this could convince the entire world that the United States favored closing Guantanamo. The United Nations could provide assistance to finding third party countries for purposes of transferring the detainees. Another problem with releasing Guantanamo captives was that they could appear in a battlefield again. Like President Obama, Secretary of State Rice, and President Bush had said that they wanted to close the detention camp (Daskal, 2007). But, the closure of Guantanamo was deferred.

Although president Obama promised to close it after his first inauguration, he has not done so. He has been elected for second term and as of September 2103 almost five years have passed since he made remarks regarding the closure. However, there is no promising sign that the facility will be closed in upcoming years. Yin (2011) asserts that while President Obama's administration criticized President Bush's operations in Guantanamo and regarded them as mistakes, his policies only constituted reactions or overreactions to President Bush's policies. The author argues that President Obama failed to implement a clear strategy, made new Guantanamo mistakes, and continued the previous consequentialist approaches of the ends justify the means strategy. However, he added that at least no new combatants have been sent to Guantanamo during the presidency of Obama to date, and detainee numbers have decreased as a result.

The Government Accountability Office's (GAO) recent report on Guantanamo detainees indicates that the GAO was assigned to investigate the current situation of correction facilities and the feasibility to hold the Guantanamo detainees in case their detention ends in Guantanamo. The researchers visited Guantanamo Bay to evaluate its situation, and investigated the correction facilities of both the Department of Defense (DOD) and the Department of Justice (DOJ). They interviewed the officials currently on duty in those facilities. According to their report, as of November 2012, DOD held 166 detainees in five facilities ranging from low to high security cells in Guantanamo. The DOD secures two court houses for military commissions and operates an information-technology infrastructure to support the protection of the military personnel. On the other hand the DOD has 6 correction facilities in the United States for service members sentenced more than 1 year. These facilities are operating at 48 percent capacity and are situated in military settings, or locations close to the public. Four important factors were identified as being worthy of consideration as a consequence of the interviews of DOD officials. First, there must be compliance with international laws, as well as national laws, and policies. Second, safety must be provided to both the DOD personnel and detainees, as well as to the general public. Third, taking information from the detainees for intelligence purpose must be ensured. Fourth, current missions and services provided by the corrections facilities must be maintained. The DOD officials also found it risky to hold the detainees in active military installation in terms of the related administrative and training operations (Lepore and Maurer, 2012).

The DOJ correction facilities consist of 2.000 prisons holding 280.000 persons charged with federal crimes at whole US soil. Analysis of detention operations documents and interviews with officials again revealed some concerns need to be considered. First, there would be a need for formulating new policy and practices for housing the detainees. Second, the safety of the personnel, the inmates, and the general public would have to be ensured. And third, adequate space for housing and separation of the existing inmates would be needed. The capacity of the current facilities of the DOJ exceeds its limits by 38 percent, and these are overcrowded, therefore expansion of their capacity is indicated. The GAO did not make any suggestions in its report, but only reported on the current availability of facilities in the hands of the government. In addition, it stated the concerns raised by officials were based on several legal and physical conditions. The DOJ commented on this report by stating that it had no plans to transfer detainees to the United States. It can be inferred from

this most recent report that even though the government wants to transfer detainees and close Guantanamo, this is not an easy task and will require an extraordinary effort, which does not seem likely to happen in the near future (Lepore and Maurer, 2012).

What the available remedy for unlawfully held Guantanamo detainees should be is an ongoing controversy. It is unclear if the order of their release constitutes a practical remedy particularly in cases where the government is unable to manage a detainee's transfer to a third country. Furthermore, whether a court would have the power to entitle a *habeas* remedy permitting entry into the United States remains unsolved (Elsea and Garcia, 2010). Despite all the opposition to Guantanamo, what reasons lay behind the present existence of the base, and how was it justified? This question will be examined next.

5. Justification for the Space of Exception's Continuing Existence

Western democracies normally attach great importance to basic human rights and civil liberties. However, after the terrorist attacks by terrorist organizations in several countries the idea that government's excessive concern with human rights and civil liberties would decrease the effectiveness of their fight against ruthless terrorists, began to prevail. Terrorists did not respect the most fundamental human right, for example the right to life; therefore they deserved to be treated harshly, because they were evil. This explanation constitutes the grounds for the war on terror and justification for the necessary evil perspective of Guantanamo (Chebel, 2012).

The human rights violations and the current existence of the space of exception can be explained best by the lesser evil approach. This approach advocates that if the rules are not able to deal with emergency situations adequately, they may not be effective. Therefore, making them responsive enough to emergency situations may be necessary; however this alteration may require a price to pay as a result. According to this approach emergency situations can justify the restriction of liberties only if the restrictions or suspensions increase the security level and if they do not impact on the constitutional order in normal time. Since the measures are problematic and immoral they have to be strictly targeted, used as a last resort, exercised to as small number of persons as possible, and kept under careful surveillance and control of the democratic institutions (Ignatieff, 2004).

In the aftermath of the 9/11 attacks, and in this emergency situation, the rules were seen as inadequate. Thus new and stricter bills, acts and authorizations were adopted and the Department of Homeland Security was born. The Guantanamo Naval Base was turned into a prison, a series of the military tribunals and joint task forces were established, interrogation techniques were authorized, and judicial guarantees were suspended. All these measures were taken by democratic state institutions to make the rules more effective and to increase security in an emergency situation. The restriction of civil liberties was considered as a last resort. Although the use of Guantanamo as a prison was illegal by means of the lease agreement and jurisdiction issues, the administration justified it by propositions of it representing the lesser evil approach. They had no choice; they had to prevent future attacks. Now that they could not bring the suspects to the United States soil, Guantanamo was seen as a lesser evil. Today, the alleged terrorists who were charged and found to be involved in terrorist attacks are still in Guantanamo. Security concerns, the high possibility of unfair trial, and the possibility of escaping justice prevent the administration from closing Guantanamo

and transferring the detainees to the mainland. Therefore, the Guantanamo base continues its existence and this can be attributed to the lesser evil approach (Ignatieff, 2004). But, there was a price to pay. The perception of the United States as a state of justice, liberty and freedom, has been affected negatively. The fundamental human rights of the suspects were clearly violated, particularly by the conduct of torture, and the incarceration of innocent people.

The Guantanamo decision also hurt the United States and its relationship with its allies, and its counterterrorism efforts. The detention policy of the space of exception damaged the United States diplomatic power and ability to advocate and spread human rights throughout the world. When leaders of some countries are criticized for human rights violations they now point out the United States and its Guantanamo policy, as they did in their speech in the United Nations General Council, in order to deflect attention from the human right violations in their own countries (Chaffee, 2009; Daskal, 2007).

If the sacrifice of human rights is seen as price to pay for security, the question of what was accomplished can be raised. The executors of the measures would argue that thanks to those measures no any other attacks have been experienced. On the other hand as Smith (2007) argued, the terrorist suspects had no useful knowledge and no any valuable intelligence was gathered from them. Thus, they were exposed to harsh interrogations and even torture for no gain in exchange. Taking into account the fact that most of the 600 detainees were released without charge and effective remedy, the basic principle of due process becomes more of an issue (Yin, 2011).

Lang (2010) in search of a solution for collective actions against transnational terrorism indicates that there is no legal basis for an international response to the crime of terrorism. He states that today this crime can generally be addressed through national courts and handled by national agendas in accord with national interests. Terrorists have been, apprehended, tried, and punished in variety of forms, some less in terms of the reach of the rules of law than others, such as in the situation in Guantanamo. Besides, he mentions terrorism, genocide, and human rights violations as most serious crimes and emphasizes the lack of consensus on trial processes and punishment in all these cases. Moreover, the concept of punishment is regarded as a political issue, not simply as legal. Herein, Hickman (2011), in agreement with Lang's argument sets forth the idea that while the claims of the government for the detention of the terrorist suspects was designed to prevent future attacks, obtain intelligence, and prosecute detainees, the actual motive was punishment, a declaration of a new order and the motive of public spectacle. Margulies (2006) describes the government's Guantanamo policy as a legal and ethical disaster that offered a false promise against terrorism.

From an ethical perspective there are some dimensions of moral judgment once can apply to examine the performed acts. These dimensions consist of motives, means, and consequences of an act and they can be named as good or bad. When the dimensions of moral judgment are considered in terms of the Guantanamo controversy, the bad motives were war on terror, and punishing the terrorists. The notions of war and punishment are inherently bad motives. The means of the struggle involved the restriction of civil liberties and the violation of human rights and international agreements, which can be deemed as bad. The

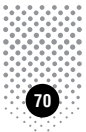
perception that this was a necessary response has been given and thus the measures taken can be considered as good consequences along with no another attack, and a place to held terrorists. In sum, the motives may be bad, the means may be bad, but consequences may be considered good. While Guantanamo is outside the jurisdiction of any legal framework, it is tolerable to some extent (Chebel, 2012; Daskal, 2007).

Discussion and Conclusion

The main discourse of this paper has focused on several ethical propositions and examples where human rights were violated, the fact that torture does not work as an effective intelligence gathering method, and the evidence that Guantanamo will remain open until the concerns for transferring and prosecuting detainees are eliminated. Due process should be a high priority here however, because innocent people may suffer. The review process should also have been or should be based on strong evidence in order to prevent wrongful detainment. The literature available on Guantanamo criticizes the continuing existence of this detention center as well as the United States government's policies. It is hard to find any backing discourse on this base in the literature. However, none of the authors provide adequate solutions as to what should be done with the nearly 50 plus most dangerous and accused terrorists. The problems of how and where they can be transferred, how and where they can be prosecuted, and security concerns are still unsolved. Beside, feelings and sensitiveness of victim's families should be taken into account. Until such solutions are found to resolving these issues mentioned above, it can be concluded that although Guantanamo is completely illegal, it is tolerable to some extent because there is no better place to hold the prisoners who involved in terrorist attacks. In the aftermath of the attacks, it was necessary to respond effectively. It was not feasible to transfer the detainees who were found strongly related to the attacks to the United States, particularly considering the passion of the families who lost their beloved ones along with security concerns. Prosecuting the detainees in the United States also raises concerns that the trial would not be fair, the evidence obtained by torture could not be used, and the protection provisions of the criminal justice system might lead to the possibility of the criminal escaping justice.

Lang (2010) responds to the question about what can be done in order to handle this controversial issue. He suggests a wider discussion about both sentencing standards and terrorism. He asserts that the international community needs to identify how to punish not only convicted terrorists, but perpetrators of genocide and other war related crimes. He also suggests that an agreement on new values is necessary, and this can be achieved only by political debate.

As a consequence of the terrorist attacks, something had to be done, and was done. A message had to be given, and was given. Despite the fact that making a distinction between the really guilty and innocent person is very challenging, captured persons should be treated humanely. If strong evidence is found against them, a final sentence should be given, but they should not be held indefinitely without charge (Daskal, 2007). Torture should not be used as punishment or for any other means. Illegitimate actions should be avoided, because they undermine the United States and its moral authority.



There is a clear conflict between the American values and the government's policy over Guantanamo. This situation harms the diplomatic power of the United States in its international relations and its perception by others as place of justice, liberty, and freedom in the international publics' mind. Definitely, there have been some positive developments, such as the intent to close the base, and to decrease the number of detainees. The recent report by the GAO can be accepted as evidence of the pursuit of the future closure of Guantanamo, however, it has been demonstrated that this is not an easy task. For the aforementioned reasons the existence of Guantanamo may be tolerable to some extent at present, as long as attention to the due process and prohibition of torture and indefinite detention is accomplished. But, once the problematic regarding the transferring and prosecution of detainees is resolved, it will not be tolerable. This issue should be resolved shortly after that.

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